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## Where (in the World) do Children Belong?

*Ann Laquer Estin\**

*Many children live in families that form and extend and dissolve across international borders. The question of where these children “belong” is complicated, with different answers in different contexts. Belonging is sometimes determined in formal terms, based on citizenship or legal immigration status. Belonging is sometimes a matter of fact, as with the “habitual residence” concept used in the Hague Children’s Conventions. Belonging may be understood more subjectively, as a matter of identity and affiliation, based on daily life or ties of family, culture, language, and heritage. Belonging can be simply a matter of the child’s presence in a place. Children in the global village rarely belong to just one place, and, in general, the broadest conception of where children belong helps to assure that governments will act to protect their welfare. When different claims of belonging come into conflict, parents and authorities should seek to understand, respect and protect children’s multiple and diverse affiliations.*

For children who grow up in closely knit communities, rooted in a particular place, the question of belonging is an easy one. In these places, common ties of language, culture, religion, and family foster a deep and layered sense of connection. Other children grow up belonging to multiple places and different communities, often geographically dispersed and sometimes spanning the globe. For children in global families, the question of belonging raises many troubling questions at the intersection of immigration law, family law, and international law.

Laws in the United States take three distinct approaches to the question of where children belong. One definition of belonging turns on citizenship or immigration status, another looks to the place where the child is at home or “habitually resident,” and a third asks only if the child is present within the geographic borders of the state. Although each of these three approaches applies in a different sphere, they regularly come into conflict.

With this essay, I argue that we can best serve the interests of

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children in global circumstances by adopting a broad conception of belonging, based on the principle that children have a right to the care and protection of their parents and the different communities in which they belong. In circumstances of conflict, courts, agencies, governments, and parents should seek to understand, respect, and protect children's many affiliations, including their ties to people and places that may be far away. Part I describes the three approaches to belonging reflected in our laws and notes some of the areas of conflict between these approaches. Part II sketches an argument for respecting children's affiliations in their full breadth, depth, and complexity, drawn both from principles of constitutional law and from international human rights.

### I. CITIZENSHIP, RESIDENCE, AND PRESENCE

Traditional Anglo-American doctrine placed jurisdiction over the child's custody and welfare in the place where the child was domiciled, while the civil law tradition looked to the country of citizenship.<sup>1</sup> In both systems, children's identity depended on their fathers, just as a married woman's domicile and nationality followed her husband's, defining with relative clarity where a family belonged.<sup>2</sup> More modern approaches recognized that women should have equal rights to establish a domicile or nationality and equal rights with respect to the nationality of their children. One result has been many more families with multiple and mixed citizenship or residence and multiple places of belonging. Rules based on nationality and domicile continue to weave through our jurisprudence, along with a strand that traces to the *parens patriae* notion that the state bears responsibility for the welfare of children present within its borders.

#### A. *Belonging Based on Citizenship*

American immigration and nationality laws seem generous in their treatment of children. We extend full citizenship to children born within our geographic borders,<sup>3</sup> to children born abroad with a U.S.-

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<sup>1</sup> See Adair Dyer, *The Internationalization of Family Law*, 30 U.C. DAVIS L. REV. 625, 635-36 (1997).

<sup>2</sup> See Ann Laquer Estin, *Families and Children in International Law: An Introduction*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 271, 295-300 (2002).

<sup>3</sup> See 8 U.S.C. § 1401(a) (1994), which is based on Section 1 of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." U.S. CONST. amend. XIV.

citizen parent,<sup>4</sup> and to many children who are adopted by U.S. citizens.<sup>5</sup> These rules extend membership on the basis of family ties or place of birth, but they also suggest the importance of social or community affiliation. Thus, a child cannot inherit U.S. citizenship unless one or both parents have lived for a period of time in the United States.<sup>6</sup>

Children who are not U.S. citizens may have lawful permanent resident (“LPR”) status.<sup>7</sup> This extends the right to stay indefinitely in the United States but is less secure than citizenship. Despite what may be lifelong ties, an individual with LPR status is subject to removal from the United States in cases of a criminal conviction.<sup>8</sup> Non-citizen children without LPR status may be lawfully present on temporary, nonimmigrant visas, or they may have no legal status. Undocumented immigrant children are particularly vulnerable to disruption of their family or community ties in the United States.<sup>9</sup>

We extend citizenship readily to children for important reasons, but that citizenship is less complete than adult citizenship, granting child citizens fewer rights than adult citizens.<sup>10</sup> Children’s immigration status is usually derivative, following the status of their parents.<sup>11</sup> Although parents are generally able to extend their status to their children, citizen-children do not have the right to petition for their parents until after they reach adulthood.<sup>12</sup> When parents who are undocumented or out of status are removed from the United States, the fact that they have citizen children is not a basis for cancellation of removal. As a result, children who are citizens are very often deported along with their parents.<sup>13</sup>

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<sup>4</sup> *Id.* § 1401(c)–(e), (g).

<sup>5</sup> Child Citizenship Act of 2000, 8 U.S.C. § 1431 (2000); *see also* 8 C.F.R. §§ 320, 322 (2003).

<sup>6</sup> *See* 8 U.S.C. § 1401(c), (g); *see also* 8 U.S.C. § 1409(a), (c). This is one of the underlying issues in *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2009), which was argued in the United States Supreme Court on November 10, 2010.

<sup>7</sup> 8 U.S.C. § 1101(20) (2010). *See generally* David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 476 (2008).

<sup>8</sup> 8 U.S.C. § 1227(a)(2) (2008); *see also* Thronson, *supra* note 7, at 476.

<sup>9</sup> Undocumented children have some legal protection based on their presence in the United States. *See Plyer v. Doe*, 457 U.S. 202 (1982) (equal protection/school attendance); *see also infra* Part I.C.

<sup>10</sup> This is true as a matter of civic personhood, most notably the limitation of voting rights to citizens age eighteen or older.

<sup>11</sup> *See* David B. Thronson, *Kids Will be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 991–95 (2002).

<sup>12</sup> 8 U.S.C. § 1151(b)(2)(A) (2009).

<sup>13</sup> *See generally* Jacqueline Bhabha, *The “Mere Fortuity of Birth”? Children, Mothers, Borders and the Meaning of Citizenship*, in MIGRATION AND MOBILITIES: CITIZENSHIP,

Courts in many nations take jurisdiction on the basis of nationality in family law or personal status matters concerning children. This can be problematic when children, or their parents, are dual citizens, and when different family members have different citizenship or immigration status. These differences pose impossible challenges in some international custody cases, particularly when one parent is not permitted to enter or reside in the country where the child lives.<sup>14</sup>

### *B. Belonging Based on Residence*

Although traditional approaches to child custody jurisdiction looked to the child's place of domicile or nationality, the modern view recognizes a variety of appropriate grounds for jurisdiction.<sup>15</sup> This increased the likelihood that several states or countries might have concurrent authority in custody matters, generating enormous conflict of laws problems. Both in the United States and internationally, current practice seeks to reduce these conflicts by assigning jurisdictional priority to a child's "home state" or "habitual residence." In most states, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)<sup>16</sup> governs jurisdiction in child custody and child protection matters. The UCCJEA treats a state where a child has lived for six months prior to the commencement of custody proceedings as the child's "home state" for jurisdictional purposes.<sup>17</sup> A court may take jurisdiction on this basis without regard to the nationality or immigration status of the child or his or her parents.<sup>18</sup> When the child's "home state" is in another state or a foreign country, however, the statute limits state courts to exercising temporary emergency jurisdiction,

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BORDERS, AND GENDER 187 (Selya Benahbib & Judith Resnik eds., 2009); David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165 (2006); Sonja Starr & Lea Brillmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 259-67 (2003).

<sup>14</sup> Bhabha, *supra* note 13, at 202-06.

<sup>15</sup> See generally HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 12.5 (Student 2d ed. 1988); EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 15.39 (4th ed. 2004); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971 & 1988 rev.).

<sup>16</sup> UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 102(4), 9 U.L.A. 662 (1999) [hereinafter UCCJEA].

<sup>17</sup> *Id.* § 201(a). This section governs jurisdiction to make an initial child-custody determination. Different rules apply if a court in another state or a foreign country has already made a child-custody determination under jurisdictional circumstances that are consistent with the UCCJEA.

<sup>18</sup> Adoption of Peggy, 767 N.E.2d 29, 35-38 (Mass. 2002); *Arteaga v. Texas Dep't of Protective and Regulatory Servs.*, 924 S.W.2d 756, 760 (Tex. Ct. App. 1996); *In re Stephanie M.*, 867 P.2d 706, 713-17 (Cal. 1994). Cf. *In re Angelica L.*, 767 N.W.2d 74, 89 (Neb. 2009) (stating that the state court has jurisdiction despite fact that parent faced deportation).

even if the child holds U.S. citizenship.<sup>19</sup>

At an international level, the Hague Children's Conventions allocate responsibility for decisions regarding children to the child's place of habitual residence.<sup>20</sup> The United States currently participates in the Child Abduction Convention<sup>21</sup> and the Intercountry Adoption Convention<sup>22</sup> and has been moving toward ratification of the Child Support Convention<sup>23</sup> and the Child Protection Convention.<sup>24</sup> Beyond the Hague Conventions, the United Nations Guidelines for the Alternative Care of Children, adopted in February 2010, provide that

[a]ll decisions concerning alternative care should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family and to minimize disruption of his/her educational, cultural and social life.<sup>25</sup>

As used in these conventions, habitual residence is intended to

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<sup>19</sup> UCCJEA § 204(a) ("A court of this State has temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.").

<sup>20</sup> See Dyer, *supra* note 1, at 636; Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 53 (2010).

<sup>21</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89, 19 I.L.M. 1501-05 (1980) [hereinafter Child Abduction Convention], available at <http://www.hcch.net/upload/conventions/txt28en.pdf>.

<sup>22</sup> Hague Convention on Protection of Children and Co-Operation in Respect of Inter-country Adoption, May 29, 1993, 32 I.L.M. 1134-46 (1993) [hereinafter Adoption Convention], available at <http://www.hcch.net/upload/conventions/txt33en.pdf>.

<sup>23</sup> Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, 47 I.L.M. 257 (2008), available at <http://www.hcch.net/upload/conventions/txt38en.pdf>. See *id.* at arts. 18 and 20; S. TREATY DOC. NO. 110-21 and S. EXEC. REP. 111-2 (Jan. 22, 2010). The U.S. Senate gave its advice and consent to ratification in October 2010, but as of January 2011 Congress has not enacted implementing legislation. See Press Release, U.S. Senate Comm. on Foreign Relations, Chairman Kerry: U.S. Senate Approves Hague Convention on the Int'l Recovery of Child Support and Other Forms of Family Maint. (Sept. 30, 2010), available at <http://foreign.senate.gov/press/chair/release/?id=066edb31-65a3-44b9-8c68-ed9ba917f413>.

<sup>24</sup> Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 35 I.L.M. 1391 (1996) [hereinafter Child Protection Convention], available at <http://www.hcch.net/upload/conventions/txt34en.pdf>. See *id.* at art. 5. The United States signed the Child Protection Convention in October 2010. Press Release, Hillary Rodham Clinton, U.S. Sec'y of State, U.S. Signature of the Child Protection Convention (Oct. 22, 2010), available at <http://www.state.gov/secretary/rm/2010/10/149860.htm>.

<sup>25</sup> Guidelines for the Alternative Care of Children, G.A. Res. 64/142, U.N. Doc. A/RES/64/142 (24 Feb. 2010), available at <http://www.sos-childrensvillages.org/Documents/SOSpublication-Guidelines-AlternativeCare.pdf>.

raise a relatively simple question of fact, avoiding the many technicalities that have surrounded concepts like “domicile” or “nationality.”<sup>26</sup> Nationality and domicile also imply a singular and stable link between an individual and a specific jurisdiction, and families that are internationally mobile tend to have a much more complex reality. The habitual residence principle is largely neutral, reflecting the wider process of globalization and migration that gives rise to these family situations. By focusing on habitual residence, the treaties direct our attention to the choices that parents have made and the child’s lived experience.<sup>27</sup> In practice, determination of habitual residence can be difficult for children who have lived in more than one country, particularly when parents have different intentions and loyalties. Courts in two places may reach different conclusions as to which country is a child’s habitual residence, or as to whether and how quickly the child’s habitual residence has changed.<sup>28</sup>

Questions of belonging are also at the core of many relocation disputes, in which one parent seeks to move with a child across international borders, often to a place where the parent has stronger ties or a better living situation. These cases challenge authorities to weigh the arguments for maintaining a child’s residence against the possible advantages of a move, in circumstances that may involve serious conflict between the child’s parents and conflicting visions of the child’s identity. Whether or not relocation is permitted, the child may be left with strong ties to different countries and parents living far apart.

The Children’s Conventions are carefully neutral on the question of citizenship, but experience with the treaties has revealed a number of tensions between the norms of habitual residence and citizenship. This is true under the Child Abduction Convention, which mandates the return of a child who has been wrongfully removed to or retained in a country that is not the child’s habitual residence.<sup>29</sup> Courts in the United States applying the Convention have entered return orders for children who are U.S. citizens, rejecting the argument that this violates some right of citizenship.<sup>30</sup> But popular and political debate

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<sup>26</sup> See Estin, *supra* note 20, at 53; E.M. Clive, *The Concept of Habitual Residence*, 1997 JURID. REV. 137.

<sup>27</sup> See Rhona Schuz, *Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context*, 11 J. TRANSNAT’L L. & POL’Y 101 (2001).

<sup>28</sup> See the discussion in *Robert v. Tesson*, 507 F.3d 981, 990–92 (6th Cir. 2007). See generally Tai Vivatvaraphol, *Back to Basics: Determining a Child’s Habitual Residence in International Abduction Cases under the Hague Convention*, 77 FORDHAM L. REV. 3325, 3354–60 (2009).

<sup>29</sup> Child Abduction Convention, *supra* note 21, art. 3.

<sup>30</sup> *E.g.*, *March v. Levine*, 249 F.3d 462 (6th Cir. 2001). In the custody context, a court rejected the argument that an order allowing a custodial parent to remove a U.S.-citizen child to

over child abduction cases, here and abroad, often highlights the child's citizenship.<sup>31</sup> Courts consider questions of nationality or immigration status explicitly in connection with the defense that is available when the removal or retention occurred more than a year before the proceeding was commenced and "the child is now settled in its new environment."<sup>32</sup> In some cases, in some countries, the child's citizenship—or factors such as culture, language, or tradition that stand for a similar claim of belonging—seems to play a role, particularly when the habitual residence norm would require sending a child away from his or her country of citizenship. As a practical matter, in parental abduction disputes handled by consular officials, intervention is more likely to occur or succeed when the interests of a U.S.-citizen parent or child are at stake.<sup>33</sup> Finally, the primacy of habitual residence over nationality in the Abduction Convention may be a factor in the reluctance of some nations to participate.

Immigration and citizenship issues are also centrally important in the practice of intercountry adoption under the Hague Adoption Convention. This Convention requires that a child brought into a receiving state for adoption must be eligible to enter and remain permanently, but it does not require that the child must be eligible for citizenship.<sup>34</sup> It also does not address whether and to what extent children's citizenship or other ties to their country of origin should be protected after intercountry adoption.

Practices of the member countries vary on these points.<sup>35</sup> Children adopted abroad by U.S.-citizen parents acquire citizenship automatical-

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another country violated the child's constitutional rights. *See* Schleiffer v. Meyers, 644 F.2d 656, 663 (7th Cir. 1981). *But see* Zaubi v. Hoejme, 530 F. Supp. 831, 838 (W.D. Pa. 1980) (abstaining and refusing to reach the constitutional question); Bergstrom v. Bergstrom, 296 N.W.2d 490, 495-97 (N.D. 1980) (failing to decide if a child has a constitutional right to stay in the U.S.).

<sup>31</sup> For a political example, compare H.R. Res. 1326, 111th Cong. (2010), which addresses the problem of "abduction to and retention of United States citizen children in Japan." with H. Res. 125, 111th Cong. (2009), which addresses international child abduction issues in terms of habitual residence rather than citizenship. *See also* Betty de Hart, "A Paradise for Kidnapping Parents": *Public Discourses on Parental Child Abduction in the Netherlands*, presented at London Metropolitan University, July 2, 2010 (manuscript on file with the author).

<sup>32</sup> Child Abduction Convention, *supra* note 21, art. 3. *See, e.g., In re B. Del C.S.B.*, 559 F.3d 999 (9th Cir. 2009). *See generally* Catherine Norris, *Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction*, 98 CAL. L. REV. 159, 174-83 (2010).

<sup>33</sup> *See generally* LUKE T. LEE & JOHN QUIGLEY, *CONSULAR LAW AND PRACTICE* 125-30, 186-90 (3d ed. 2008). U.S. consular practice is addressed in part 7 of the State Department's Foreign Affairs Manual, available at <http://www.state.gov/m/a/dir/regs/fam/>.

<sup>34</sup> Adoption Convention, *supra* note 22, at art. 5(c).

<sup>35</sup> William Duncan, *Nationality and the Protection of Children Across Frontiers, and the Example of Intercountry Adoption*, 8 Y.B. OF PRIV. INT'L L. 75 (2006).



ly upon entry to the United States,<sup>36</sup> and only U.S. citizens can obtain visas to bring a newly-adopted child into the country.<sup>37</sup> To help protect the integrity of the Hague Adoption rules, U.S. regulations define a child's "habitual residence" with reference to the child's country of citizenship.<sup>38</sup> Thus, officials in the child's country of citizenship must approve an adoption into the United States, even if the child has been habitually resident in a different nation.

The complex linkage between adoption, belonging, and citizenship is also suggested by the practice in those countries that ask parents to send post-adoption reports back to the child's country of origin concerning the child's development and welfare. Many adoptive parents work to support their children's sense of belonging to their original home country, and some adoptees make significant efforts to reconnect with their birth places or families after reaching adulthood. Depending on the countries involved, adopted children may retain the citizenship of their country of birth, even after obtaining new citizenship through an intercountry adoption.<sup>39</sup>

Although habitual residence provides a basis for jurisdiction in family law and international family law, we have not seen it as a sufficient basis for extending political membership to children without citizenship or immigration status, even if they have lived virtually all of their lives within our borders and have only tenuous ties to their country of nationality. The debate in recent years over the DREAM Act underlines this point. Passage of this legislation would extend conditional resident status to many children who entered the country before age 16, and create a pathway to citizenship for those who serve in the military or graduate from college.<sup>40</sup>

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<sup>36</sup> Child Citizenship Act of 2000, 8 U.S.C. § 1431 (2000). Children who immigrate for purposes of adoption as lawful permanent residents acquire citizenship automatically once the adoption is granted or recognized by state authorities. 8 U.S.C. §1431. *See generally* SARAH B. IGNATIUS & ELISABETH S. STICKNEY, IMMIGRATION LAW AND THE FAMILY § 15:31 (2010 Update).

<sup>37</sup> 8 U.S.C. §1101(b)(1)(F), (G). *See generally* IGNATIUS & STICKNEY, *supra* note 36 §\_13:15 and §13:43. A lawful permanent resident may petition for admission of an adopted child under §1101(b)(1)(E), and may obtain a family preference visa for an adopted minor child under 8 U.S.C. § 1153(a)(2)(A) (2006), but these procedures include a number of additional requirements and obstacles. *See generally* IGNATIUS & STICKNEY, *supra* note 36 §§3:3 and 13:2-13:14.

<sup>38</sup> A child present in the United States who is not a U.S. citizen is deemed to be habitually resident in his or her country of citizenship. *See* 8 C.F.R. §204.3(k) (2008).

<sup>39</sup> *See* Duncan, *supra* note 35.

<sup>40</sup> For one iteration of this legislation, which passed the House but failed in the Senate in December 2010, see the Development, Relief, and Education for Alien Minors Act, S. 3992, 111th Cong. (2010).

### *C. Belonging Based on Presence*

In order to protect the interests of children, state courts assert jurisdiction over all children present within the geographic borders of the state. Both the UCCJEA<sup>41</sup> and the Hague Child Protection Convention<sup>42</sup> provide for temporary emergency jurisdiction on this basis, and in these cases, courts may assume jurisdiction over families including parents or children who are not (or not all) citizens or habitual residents.<sup>43</sup> Under the “status exception” to the personal jurisdiction requirement,<sup>44</sup> our courts conclude that they need not have personal jurisdiction over the child’s parents in child welfare cases, even when the proceeding may result in termination of parental rights.<sup>45</sup> Constitutional due process norms protect the rights of nonresident parents to notice and an opportunity for a hearing, but this may prove difficult in cases with international dimensions.<sup>46</sup>

Global children’s cases raise important issues of language, culture, and the need for casework and litigation techniques that can reach across international borders. Even locating the child’s parents or extended family members may prove difficult. These factors have important implications for the parents’ right to due process and the larger goal of serving the best interests of the child.

Despite the practical difficulties, courts and agencies working with global families should make careful efforts to provide real notice and a meaningful opportunity for a hearing to parents beyond their jurisdiction. Agencies such as International Social Service can assist in locating and working with family members abroad, and devices such as the Hague Service and Evidence Conventions provide channels for judicial assistance.<sup>47</sup> For cases involving children or parents who are foreign

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<sup>41</sup> See UCCJEA § 204(a).

<sup>42</sup> Child Protection Convention, *supra* note 24, at art. 5.

<sup>43</sup> See *e.g.*, *In re Nada R.*, 108 Cal. Rptr. 2d 493 (Cal. Ct. App. 2001); see also *supra* note 18.

<sup>44</sup> See generally *Pennoyer v. Neff*, 95 U.S. 714, 734–45 (1877); *Shaffer v. Heitner*, 433 U.S. 186, 208 n.30 (1977). But see *May v. Anderson*, 345 U.S. 528 (1953). These cases are discussed in CLARK, *supra* note 15, and SCOLES, *supra* note 15.

<sup>45</sup> See *e.g.*, *In re W.A.*, 63 P.3d 607, 613–17 (Utah 2002) (citing cases); see also *J.D. v. Tuscaloosa Cnty. Dep’t of Human Res.*, 923 So. 2d 303 (Alab. Civ. App. 2005); *In re Thomas J.R.*, 663 N.W.2d 734, 738–49 (Wis. 2003). But see *In re Claudia S.*, 31 Cal. Rptr.3d 697, 703–07 (Cal. Ct. App. 2005); *In re John Doe*, 926 P.2d 1290, 1296–98 (Haw. 1996) (reversing termination of parental rights of mother in the Philippines whose only contact with the state was agreeing to the father’s taking child there for a brief visit).

<sup>46</sup> See Ann Laquer Estin, *Global Child Welfare: The Challenges for Family Law*, 63 OKLA. L. REV. (forthcoming 2011).

<sup>47</sup> These are the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. 6638, 658

or dual nationals, the Vienna Convention on Consular Relations mandates consular notice and access once a child is taken into care.<sup>48</sup> Both the Child Abduction Convention and the Child Protection Convention provide tools for communication and cooperation between judicial and other authorities in Contracting States.<sup>49</sup> In these cases, it is particularly important for authorities to listen to the voices of children who are old enough to express their own sense of family and community ties.

In child welfare cases, the most difficult challenge may be balancing our strong humanitarian impulses and our tendency to favor ties based on presence and recent care for a child against the substantial risk that the process will skew against children's interest in family preservation and parents' rights to make decisions concerning their children.<sup>50</sup> This conflict appears most starkly in the context of special immigrant juvenile status, which opens a path to lawful residence and citizenship for undocumented children whose parental rights have been terminated.<sup>51</sup> It is tempting to view termination of parental rights as beneficial precisely because it may allow a child to obtain lawful permanent residence and remain in the United States.<sup>52</sup> The same humanitarian impulses extend to children beyond our borders who are caught

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U.N.T.S. 163, *reprinted in* 4 I.L.M. 341 (1965), and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. 7444, 847 U.N.T.S. 231, appended to 28 U.S.C. § 1781, *reprinted in* 8 I.L.M. 37 (1969).

<sup>48</sup> Done at Vienna 24 April 1963, entered in force 19 March 1967. UNTS v. 596 p. 261, ratified by the United States on 24 November 1969 [21 U.S.T. 77, T.I.A.S. No. 6820 (1970).] Consular notice should be understood not simply as a procedural requirement, but as a practical means of initiating cooperation between governments. *See Arteaga v. Tex. Dep't of Protective and Regulatory Servs.*, 924 S.W.2d 756, 761 (Tex. App. 1996); *E.R. v. Marion Cnty. Office of Family & Children*, 729 N.E.2d 1052, 1056–59 (Ind. Ct. App. 2000); *In re Angelica L.*, 767 N.W.2d 74, 96–97 (Neb. 2009) (Gerrard, J., concurring).

<sup>49</sup> Child Abduction Convention, *supra* note 21, at arts. 7, 15; Child Protection Convention, *supra* note 22, at arts. 29–39.

<sup>50</sup> *See, e.g., In re Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. 2007) (involving parents who spent years trying to regain custody of their daughter in a case that drew significant public attention); *In re Sanjivini K.*, 391 N.E.2d 1316 (N.Y. 1979). Andrew Jacobs, *Chinese and American Cultures Clash in Custody Battle for Girl*, 5, N.Y. TIMES, Mar. 2, 2004, at A14; *see also* Amity R. Boye, Note, *Making Sure Children Find Their Way Home: Obliging States Under International Law to Return Dependent Children to Family Members Abroad*, 69 BROOK. L. REV. 1515 (2004).

<sup>51</sup> *See* 8 U.S.C. § 1101(a)(27)(J); 8 CFR § 204.11 (2009). *See generally* IGNATIUS & STICKNEY, *supra* note 36 §§14:84 – 14:87; Thronson, *supra* note 11, at 1003–13. Note that the SIJS statute was amended in 2008 by the Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 122 Stat. 5044 (2008).

<sup>52</sup> A child may be eligible for Special Immigrant Juvenile status under 8 U.S.C. § 1101(a)(27)(J) if a state court determines that “reunification with one or both immigrant’s parents is not viable due to abuse, neglect, abandonment or a similar basis found under State law” and makes a determination that it would not be in the child’s best interest to be returned to the child’s or parent’s previous country of nationality or the country of last habitual residence.

in war or natural disaster.<sup>53</sup> In these cases, we need to take care so that our eagerness to embrace children who are victims of circumstances does not blind us to the importance of respecting and preserving their family ties.<sup>54</sup>

## II. BELONGING FROM THE CHILD'S PERSPECTIVE

Whether we frame the question of belonging in terms of citizenship, residence, or presence, children's membership is less stable and more contested than adult status, largely subject to adult decisions in which the child has little voice.<sup>55</sup> The rules that define which children belong to the United States reveal more about adult rights than about children's interests. We understand that an important privilege of adult citizenship or immigrant status is the ability to confer that status on family members, whether those family ties result from birth or adoption. Adult citizens have mobilized the government, including Congress and the State Department, to assist them in reaching out beyond our borders to establish new family ties through marriage and adoption or to protect their custodial rights.<sup>56</sup> This doesn't work in the other direction, however, and the contrast between special immigrant juvenile status and the repeated failure of the DREAM Act makes this clear. For unparented, noncitizen children present in the United States, we extend the old idea of *parens patriae* and authorize the state, acting through a juvenile court, to extend permanent residency.<sup>57</sup> For noncitizen children in the United States with ongoing ties to their noncitizen parents, we do not offer access to formal membership, whatever the strength of their local ties.<sup>58</sup> Their foreign parental ties effectively disqualify them from citizenship.

What would it mean to consider belonging from the child's perspective? Our constitutional tradition includes strong protection for pa-

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<sup>53</sup> We have seen this recently in the evacuation of children from Haiti after the 2010 earthquake and a generation ago in "Operation Babylift" at the end of the war in Vietnam. For litigation brought by family members seeking custody of children after the babylift, see *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978). See also *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (9th Cir. 1975).

<sup>54</sup> See *UNICEF's Position on Inter-country Adoption*, (July 22, 2010), available at [http://www.unicef.org/media/media\\_41918.html](http://www.unicef.org/media/media_41918.html).

<sup>55</sup> See, e.g., *Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985); *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

<sup>56</sup> See Thronson, *supra* note 7, at 510–11 (pointing out that the Child Citizenship Act "was legislation prompted largely by concerns over how immigration law operated as family law, reaching into white, middle class families with U.S. citizen parents.").

<sup>57</sup> See *supra* notes 51–52 and accompanying text.

<sup>58</sup> See *supra* note 40 and accompanying text.

rental rights, with the understanding that the state may intervene to protect children from harm.<sup>59</sup> We do not have a similarly robust constitutional tradition addressing children's constitutional interest in protection of their family relationships.<sup>60</sup> This is more clearly established in international human rights law, including the International Covenant on Civil and Political Rights (ICCPR)<sup>61</sup> and the United Nations Convention on the Rights of the Child (CRC),<sup>62</sup> in provisions that reflect a broad global consensus consistent with many aspects of our own legal tradition.

Both the ICCPR and the CRC recognize the family as the “fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children . . . .”<sup>63</sup> Picking up on the idea that families are particularly important for children, the CRC Preamble states “that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”<sup>64</sup> Both conventions recognize the important roles of family, society, and the state in protecting children,<sup>65</sup> and the CRC requires that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>66</sup> In addition, the CRC extends to a child “who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”<sup>67</sup>

Several provisions in the CRC emphasize the importance of protecting a child's relationships with both parents, even in international

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<sup>59</sup> *Troxel v. Granville*, 530 U.S. 57, 65–69 (2000).

<sup>60</sup> *Id.* at 80–91 (Stevens, J., dissenting).

<sup>61</sup> International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, G.A. Res. 2200A(XXI), U.N. Doc. A/6316, 999 U.N.T.S. 171, *entered into force*, Mar. 23, 1976 (ratified by the United States in 1992).

<sup>62</sup> Convention on the Rights of the Child (CRC), Nov. 20, 1989, G.A. Res. 44/25 (Annex), U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, *reprinted at* 28 I.L.M. 1456 (1989). The United States has signed but not yet ratified the CRC.

<sup>63</sup> *Id.* at pmbl. & art. 5. *See also* ICCPR, *supra* note 61, at art. 23(1) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”).

<sup>64</sup> CRC, *supra* note 62, at pmbl.

<sup>65</sup> *See* ICCPR, *supra* note 61, at art. 24(1); CRC, *supra* note 62, at arts. 3(2), 5, 9, 18(1), 19, 20.

<sup>66</sup> CRC, *supra* note 62, at art. 3(1).

<sup>67</sup> *Id.* at art. 12(1).

cases. Article 9(1) states that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."<sup>68</sup> All interested parties must be given an opportunity to participate in the proceedings and make their views known. Seen from the child's perspective, Article 9(3) affirms the child's right to maintain "personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests." Under Article 10(2), this same right to maintain personal relations and direct contact applies to a child whose parents reside in different countries.<sup>69</sup>

In the context of child welfare proceedings, Article 19 mandates that States Parties take appropriate measures "to protect the child from all forms of physical or mental violence, injury or abuse, neglect of negligent treatment, maltreatment or exploitation, including sexual abuse . . . ." Article 20 addresses alternative care for children who are temporarily or permanently deprived of their family environment, or who cannot safely be allowed to remain in that environment. Noting that such alternative care could include "foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children," Article 20(3) stipulates that in considering alternatives "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background." The importance of continuity is also reflected in the U.N. Guidelines for the Alternative Care of Children, which embrace the habitual residence principle for circumstances in which children are removed from the care of their parents.<sup>70</sup>

Respect for the child's "ethnic, religious, cultural and linguistic background" is a corollary of the nondiscrimination principle in both the CRC and the ICCPR which prohibit discrimination on grounds including "race, colour, sex, language, religion, national or social origin, property or birth . . . ."<sup>71</sup> Such respect also follows from the

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<sup>68</sup> Cf. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

<sup>69</sup> This may not apply in "exceptional circumstances;" but note that Art. 10(2) goes on to specify that States parties "shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country." See also Article 11, requiring States Parties to "take measures to combat the illicit transfer and non-return of children abroad," such as the measures included in the Hague Child Abduction Convention.

<sup>70</sup> See Guidelines for the Alternative Care of Children, *supra* note 25.

<sup>71</sup> See ICCPR, *supra* note 61, at art. 24(1). See also CRC, *supra* note 60, at art. 2(1) (prohibiting discrimination on the basis of "race, colour, sex, language, religion, political or oth-

identity rights protected by the conventions, including the right to a name, a nationality, and “to know and be cared for by his or her parents.”<sup>72</sup> The conventions reflect particular historic concerns with the harms that result from a lack of birth registration or statelessness, and thus, they do not address the possibility of multiple nationality or conflicting identity claims, except to affirm that a child has a right to personal relations and direct contact with both parents.<sup>73</sup>

The continuity principle is also embedded in the provisions on intercountry adoption in CRC Article 21, which suggests that intercountry adoption “may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.” In the adoption context, the question of where children belong is strenuously contested, and the language of Article 21 has been a source of controversy—particularly if it is read to suggest that institutional care in the child’s habitual residence is preferable to adoption into another ethnic, religious, cultural or linguistic setting. Many adoption advocates and experts in the United States prefer the language in the CRC Preamble, recognizing that a child should grow up in a family environment.<sup>74</sup>

For displaced children, including those who are accompanied by their parents and those who are unaccompanied, CRC Article 22 requires states to take appropriate measures to ensure that children seeking refugee status are eligible for such status and receive appropriate protection and humanitarian assistance. This includes the same protections that would be extended to adults under international law, as well as assistance in tracing parents or other family members to facilitate the child’s reunification with his or her family, if possible.<sup>75</sup>

What do these principles of international human rights law suggest on the question of where children belong? Children belong to both of their parents, to their extended families, and to the communities defined by their birth, upbringing and their ethnic, religious, cultural or linguistic identity. When children are separated from parents and family members, or when those adults cannot safely or adequately care for children, it is the responsibility of the larger surrounding community to act on their behalf. When children’s lives reach across borders,

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er opinion, national ethnic or social origin, property, disability, birth or other status”).

<sup>72</sup> See CRC, *supra* note 62, at arts. 7, 8; ICCPR, *supra* note 61 at arts. 24(2), (3).

<sup>73</sup> CRC, *supra* note 62, at art. 10(2).

<sup>74</sup> See *supra* text accompanying note 63.

<sup>75</sup> If no parents or other family members can be found, the child should be accorded “the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason.” *Id.*

when they belong in more than one place, we can make efforts to protect all of these important ties.

A broad approach to belonging understands that children have many types of affiliation. It encourages cooperation and communication whenever possible, at every level, to protect children's ties based on birth, family, residence, and citizenship. It suggests that we should act to protect all children within our borders, and respect all aspects of children's identity, including those that reach into distant places. It suggests, in every case, that we should strive to hear what children have to tell us about where they feel that they belong.





